

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN DAVID EVERETT,

Plaintiff,

v.

PIERCE COUNTY, *et al.*,

Defendants.

Case No. C07-5138FDB

REPORT AND  
RECOMMENDATION

Noted for June 22, 2007

This § 1983 Civil Rights matter has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. This matter comes before the court on plaintiff's failure to cure certain deficiencies in his complaint. For the reasons set forth below, the undersigned recommends that the Court dismiss this matter for failure to state a cognizable claim.

DISCUSSION

A complaint is frivolous when it has no arguable basis in law or fact. Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (citing Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)). A plaintiff must allege a deprivation of a federally protected right in order to set forth a prima facie case under 42 U.S.C. §1983. Baker v. McCollan, 443

1 U.S. 137, 140 (1979). In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1)  
2 the conduct complained of was committed by a person acting under color of state law and that (2) the  
3 conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the  
4 United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds, Daniels v.  
5 Williams, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if  
6 both of these elements are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), cert.  
7 denied, 478 U.S. 1020 (1986).

8 Plaintiff is a state prisoner, currently in custody at the Stafford Creek Corrections Center. On  
9 April 30, 2007, this court reviewed plaintiff's complaint and issued an order directing plaintiff to cure  
10 certain deficiencies (Doc. 6). Specifically, the court found and explained the following deficiencies: (i)  
11 plaintiff's claims appeared to challenge the validity of his underlying conviction or sentence; (ii) plaintiff  
12 failed to allege facts showing how any of the named defendants personally participated in the alleged  
13 harmful acts or omissions to act; and (iii) plaintiff named the state prosecutors as a defendants in the  
14 matter, entitled to prosecutorial immunity.

15 Plaintiff was instructed to file an amended complaint curing, if possible, the above-mentioned  
16 defects **by not later than May 23, 2007**. Plaintiff was warned that his failure to cure or to respond  
17 appropriately could result in dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915.

18 On May 15, 2007, plaintiff filed his response to the court's order (Doc. 7). After reviewing the  
19 pleading, the undersigned finds that plaintiff has failed to cure the above deficiencies and recommends the  
20 Court dismiss this matter as frivolous.

21 Plaintiff focused his response on the Heck v. Humphrey issue, but even if he arguably had his  
22 conviction or sentence invalidated, as required by that doctrine, Plaintiff has not addressed the issues of  
23 personal participation or prosecutorial immunity. The court previously explained to Mr. Everett, in order  
24 to state a for damages claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct  
25 complained of was committed by a person acting under color of state law and that (2) the conduct deprived  
26 a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt  
27 v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327  
28 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements

1 are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020  
2 (1986).

3 Here, the Complaint names the Pierce County Prosecuting Attorneys Office and two individual  
4 attorneys as defendants. Plaintiff does not explain how either of these two individuals personally  
5 participated in the alleged constitutional deprivation. Moreover, prosecutors are entitled to absolute  
6 immunity from liability for damages under § 1983. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).  
7 Prosecutorial immunity protects a prosecutor who "acts within his or her authority and in a quasi-judicial  
8 capacity." Kalina v. Fletcher, 522 U.S. 118 (1997). If the prosecutor acts as an advocate 'in initiating a  
9 prosecution and in presenting the State's case,' absolute immunity is warranted." Ybarra v. Reno  
10 Thunderbird Mobile Home Village, 723 F.2d 675, 678 (9th Cir. 1984) (quoting Imbler, 424 U.S. at 430-  
11 431).

#### 12 CONCLUSION

13 Because plaintiff fails to state a cognizable § 1983 constitutional claim, the Court should DISMISS  
14 this case as frivolous. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil  
15 Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also*  
16 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.  
17 Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is  
18 directed to set the matter for consideration on **June 22, 2007**, as noted in the caption.

19 DATED this 31<sup>st</sup> day of May, 2007.

20  
21 /s/ J. Kelley Arnold  
22 J. Kelley Arnold  
23 United States Magistrate Judge  
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